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In The

Supreme Court of the United States

October Term, 1987

RUSSELL HOBSON,

Petitioner,

vs.

UNITED STATES OF AMERICA,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

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QUESTION PRESENTED FOR REVIEW

Whether an isolated act which simultaneously violates two statutes may be charged as "two acts of racketeering activity," demonstrating the "continuity" necessary to establish a "pattern of racketeering activity" under the Racketeer Influenced and Corrupt Organizations Act, 18 U.S.C. § 1961(5)?

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OPINION BELOW

The opinion of the Court of Appeals for the Eleventh Circuit is reported at 825 F.2d 364 and is reprinted at Appendix A (App. 1a-6a) to this petition.

JURISDICTION

The judgment of the court of appeals was entered on August 25, 1987. The court of appeals denied the timely petition for rehearing and *en banc* consideration on September 23, 1987 (Order reprinted at Appendix B). This Court's jurisdiction is invoked under 28 U.S.C. § 1254(1).

STATUTES INVOLVED

This petition concerns the construction and application of the following provisions of the Racketeer Influenced and Corrupt Organizations Act ("RICO"), 18 U.S.C. §§ 1961-68 (enacted as the Organized Crime Control Act of 1970, Pub.L. 91-452, Title IX, § 901(a), 84 Stat. 941; as amended Pub.L. 95-575, § 3(c), 92 Stat. 2465 (1978); Pub.L. 95-598, Title III, § 314(g), 92 Stat. 2677 (1978)):

18 U.S.C. § 1961. Definitions

As used in this chapter -

(1) "racketeering activity" means

* * *

(D) any offense involving . . . the felonious manufacture, importation, receiving, concealment, buying, selling, or otherwise dealing in narcotic or other dangerous drugs, punishable under any law of the United States;

* * *

(5) "pattern of racketeering activity" requires at least two acts of racketeering activity....

18 U.S.C. § 1962. Prohibited activities

* * *

(c) It shall be unlawful for any person employed by or associated with any enterprise engaged in, or the activities of which affect, interstate or foreign commerce, to conduct or participate, directly or indirectly, in the conduct of such enterprise's affairs through a pattern of racketeering activity....

(d) It shall be unlawful for any person to conspire to violate any of the provisions of subsections (a), (b), or (c) of this section.

The full texts of the relevant provisions of RICO are reprinted at Appendices C.1 (App. 10a-11a), C.2 (App. 11a) and C.3 (App. 11a-13a).

The full texts of 21 U.S.C. § 841(a) (enacted as the Controlled Substances Act, Pub.L. 91-513, Title II, § 410, 84 Stat. 1260 (1970)) and 21 U.S.C. § 952(a) (enacted as Pub.L. 91-513, Title III, § 1002, 84 Stat.1285 (1970)) are reprinted at Appendices C.4 (App. 14a) and C.5 (App. 15a).

STATEMENT OF THE CASE

In September 1981, petitioner Russell Hobson ("Hobson") was indicted as a participant in an organization which imported and distributed marijuana. Following a jury trial in the United States District Court for the Northern District of Florida, Hobson was convicted on the six counts charged against him, including conspiracy to violate the Racketeer Influenced and Corrupt Organizations Act ("RICO") (18 U.S.C. § 1962(d)) and substantive violation of RICO (18 U.S.C. § 1962(c)).[1]

The "pattern of racketeering activity" underlying the RICO convictions was purportedly established by the concurrent convictions of Hobson for importation of marijuana (21 U.S.C. § 952(a)) and possession of marijuana with intent to distribute (21 U.S.C. § 841(a)). The predicate acts of racketeering arose from an isolated event that simultaneously violated two statutes: a single payment on deposit for a shipment of marijuana.

The evidence adduced at trial revealed that in February 1979 one Bill Cobb, an unindicted co-conspirator and a principal in the illicit organization, arranged an attempt to import a cargo of marijuana aboard a Lockheed Constellation airplane. Hobson and co-defendant Patrick Waldrop made a $1,500,000 down payment to receive the marijuana. Federal agents seized the aircraft and its cargo

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[1] Hobson was also convicted of conspiracy to import marijuana, importation of marijuana, conspiracy to possess marijuana with intent to distribute, and possession of marijuana with intent to distribute.

when it landed in Panama City, Florida.[2] The district court's instructions to the jury limited the predicate acts charged against Hobson under the RICO counts to the two substantive drug offenses that arose simultaneously out of the down payment for the marijuana.

On October 1, 1984, the Court of Appeals for the Eleventh Circuit affirmed the convictions against Hobson. *United States v. Bascaro*, 742 F.2d 1335 (11th Cir. 1984), *cert. denied*, 472 U.S. 1017 (1985). The court of appeals rejected Hobson's argument that the government's exclusive reliance on the discrete act of a down payment and the two crimes engendered by that isolated event failed to establish a "pattern of racketeering activity." *Bascaro*, 742 F.2d at 1360-61. On June 17, 1985, Hobson's petition for certiorari was denied. *Hobson v. United States*, 472 U.S. 1017 (1985) (No. 84-1148).

On July 1, 1985, this Court issued its decision in *Sedima, S.P.R.L. v. Imrex Co.*, 473 U.S. 479 (1985). The Court construed a "pattern of racketeering activity" as continuing activity and implicitly rejected the view that an isolated event may establish a pattern. *See Sedima*, 473 U.S. at 496n.14; *see also id.* at 527-28 (Powell, J., dissenting).

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[2] On Hobson's direct appeal of his conviction the court of appeals incorrectly concluded that Hobson had a financial interest in a prior, unsuccessful attempt to smuggle a cargo of marijuana aboard a DC-3 airplane. *United States v. Bascaro*, 742 F.2d 1335, 1358 (11th Cir. 1984), *cert. denied*, 472 U.S. 1017 (1985). The Solicitor General corrected this misapprehension in his brief in opposition to Hobson's prior petition for certiorari. Brief For The United States In Opposition at 12-13, *Hobson v. United States*, 472 U.S. 1017 (1985) (No. 84-1148).

On September 19, 1985, Hobson filed a petition pursuant to 28 U.S.C. § 2255 asserting that *Sedima* constituted an intervening change in the law entitling him to a reversal of the RICO convictions. *See, e.g., Davis v. United States,* 417 U.S. 333, 342 (1974). The district court denied relief. The Court of Appeals for the Eleventh Circuit affirmed the denial and asserted the continuing validity of its rule that "two separate crimes clearly constitute two separate acts for purposes of RICO," *United States v. Hobson,* 825 F.2d 364, 366n.2 (11th Cir. 1987), irrespective of the circumstances under which the crimes arose, the statutory definition of a "pattern of racketeering activity," and the legislative intent that RICO be applied in cases of continuing, not sporadic or isolated, activity.

REASONS FOR ALLOWANCE OF THE WRIT

This is the paradigmatic case for judicial resolution and limitation of what constitutes a "pattern of racketeering activity" under the Racketeer Influenced and Corrupt Organizations Act ("RICO"). Hobson's RICO convictions, premised on a single physical act, are contrary to the definition of a "pattern of racketeering activity" and breach the outermost limits of the statute's conceivable application. The Court has not ruled on the question presented for review by this petition.

A square conflict exists between the Eleventh Circuit's decision below and the Eighth Circuit's decision in *United States v. Kragness* "that it is not proper under RICO to charge two predicate acts where one action violates two statutes." *United States v. Kragness*, 830 F.2d 842, 861 (8th Cir. 1987). Furthermore, in the two years since this Court challenged "the courts to develop a meaningful concept of "pattern,"" *Sedima*, 473 U.S. at 500, the courts of appeal have developed a substantial, cacophonous body of case law which only this Court may harmonize.

I

THE COURT OF APPEALS MISCONSTRUED THE DEFINITION OF PATTERN OF RACKETEERING ACTIVITY AND MISAPPLIED RICO TO AN ISOLATED ACT

The Eleventh Circuit's holding that a single act may constitute a "pattern of racketeering activity" under RICO is contrary to the language of the statute, the legislative history behind the statute, and this Court's pronouncements concerning the pattern requirement.[3]

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[3] Charging importation of marijuana and possession of marijuana with intent to distribute as RICO predicate crimes arising out of a single marijuana shipment is also contrary to the Department of Justice's current guidelines for charging separate predicate acts. The Justice Department's manual for RICO prosecutions states, "approval [of a proposed RICO count] will not be granted where the pattern as to any

RICO prohibits any person from participating in the conduct of an enterprise "through a pattern of racketeering activity." 18 U.S.C. § 1962(c). A pattern of racketeering activity "requires at least two acts of racketeering activity." 18 U.S.C. § 1961(5). "If the statutory language is unambiguous, in the absence of a 'clearly expressed legislative intent to the contrary, that language must ordinarily be regarded as conclusive.'" *United States v. Turkette*, 452 U.S. 576, 580 (1981), quoting from *Consumer Product Safety Comm'n v. GTE Sylvania, Inc.*, 477 U.S. 102, 108 (1980). To maintain, as the Eleventh Circuit does, that one act may equal two acts of racketeering activity defies language and logic.

The "clearly expressed legislative intent" behind RICO unequivocally supports a plain reading of RICO's definition of pattern to require two acts committed at different times. As the Senate Committee on the Judiciary explained "pattern of racketeering activity":

> The concept of "pattern" is essential to the operation of the statute. One isolated "racketeering activity" was thought insufficient to trigger the remedies provided under the proposed chapter, largely because the net would be too large

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one defendant includes both importation and possession with intent to distribute with respect to the same load of narcotics." U.S. Department of Justice, Criminal Division, Racketeer Influenced and Corrupt Organizations (RICO): A Manual for Federal Prosecutors 51 (1st Revised Ed. 1986); *see also United States v. Kragness*, 830 F.2d at 86ln.20 (8th Cir. 1987). Under the Justice Department's current construction of the pattern requirement Hobson would not be indicted under RICO solely on the basis of the down payment for a single shipment of marijuana.

> and the remedies disproportionate to the gravity of the offense. The target of Title IX [RICO] is thus not sporadic activity. The infiltration of legitimate business normally requires more than one "racketeering activity" and the threat of *continuing* activity to be effective. It is this factor of *continuity* plus relationship which combines to produce a pattern.

S. Rep. No. 617, 91st Cong., 1st Sess. 518 (1969) (emphasis added). "Continuing activity" requires activity over a period of time or multiple acts, not a legalistic division of a single act into two predicate acts. Thus, RICO is "not aimed at the isolated offender." 116 Cong. Rec. 35193 (1970) (statement of Rep. Poff, floor manager for the RICO legislation in the House of Representatives).

Finally, this Court's comments on the pattern requirement belie the Eleventh Circuit's conclusion that one act may constitute a pattern under RICO. "The pattern of racketeering activity is . . . *a series of criminal acts* as defined by the statute." *Turkette*, 452 U.S. at 583 (emphasis added). A series of criminal acts necessarily occurs over a period of time and, *a fortiori*, cannot be accomplished in a single act.

In *Sedima*, the Court offered an extended analysis of the pattern requirement, citing the forementioned legislative history with particular emphasis on the "factor of continuity plus relationship

which combines to produce a pattern." The Court concluded by noting:

> Significantly, in defining "pattern" in a later provision of the same bill, Congress was more enlightening: "criminal conduct forms a pattern if it embraces criminal acts that have the same or similar purposes, results, participants, victims, or methods of commission, or otherwise are interrelated by distinguishing characteristics and are not isolated events." 18 U.S.C. § 3575(e). This language may be useful in interpreting other sections of the Act. *Cf. Ianelli v. United States*, 420 U.S. 770, 789 (1975).

Sedima, 473 U.S. at 496n.14. The Court's emphasis on continuity and the suggestion that the stringent pattern definition of 18 U.S.C. § 3575(e) may be an appropriate analogue to the RICO pattern requirement further support the conclusion that a pattern of racketeering activity arises over a period of time, not from a single act.

Despite these signposts, the Eleventh Circuit ventured beyond the limits of RICO. The conclusion that a single act constitutes a pattern under RICO is an indefensible expansion of the statute's application and warrants this Court's review by issuance of a writ of certiorari.

II

THE DIRECT CONFLICT BETWEEN THE ELEVENTH AND EIGHTH CIRCUITS AND THE DISPARATE RICO PATTERN ANALYSES EMPLOYED BY THE SECOND, THIRD, FOURTH, FIFTH, SEVENTH, NINTH AND TENTH CIRCUITS MUST BE RESOLVED.

Among the discordant responses to this Court's invitation "to develop a meaningful concept of 'pattern,'" *Sedima*, 473 U.S. at 500, the Eleventh Circuit's discovery of a RICO pattern within a single act represents the most expansive construction of the pattern requirement to date. Indeed, *Sedima* did not affect the Eleventh Circuit's decision in *Hobson*. "*Sedima's* footnote . . . does not necessarily change this circuit's rule, as applied in Hobson's direct appeal, that two separate crimes clearly constitute two separate acts for purposes of RICO." *Hobson*, 825 F.2d at 366n.2. The Eleventh Circuit did not acknowledge that its "separate crimes" analysis evolved in a series of pre-*Sedima* decisions in which each predicate crime arose from a different act, thereby reflecting the continuity subsequently emphasized in *Sedima* as necessary to

establish a RICO pattern.[4] In contrast, both of the predicate crimes charged against Hobson arose from one act. The Eleventh Circuit's misapplication of its precedents threatens an unwarranted extension of RICO by circumventing the pattern requirement.

The Eighth Circuit's decision in *United States v. Kragness*, 830 F.2d 842 (8th Cir. 1987), squarely conflicts with *Hobson*. In both cases the government charged violations of 21 U.S.C. §841(a) (importation or marijuana) and 21 U.S.C. § 952(a) (possession of marijuana with intent to distribute) arising out of a single marijuana shipment as the two racketeering acts under RICO. Relying on *Sedima's* analysis of RICO's legislative history and on the Department of Justice's manual for RICO prosecutions, the Eighth Circuit concluded, "[w]e do not think that the factor of '*continuity plus relationship*' [citation omitted; emphasis in the original], which Congress thought necessary to establish a pattern, can be present where only a single act, albeit an act

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[4] *See United States v. Fernandez*, 797 F.2d 943, 949-52 (11th Cir. 1986), *cert. denied*, 107 S.Ct. 3230 (1987) (conspiracy to kidnap and conspiracy to murder; post-*Sedima*); *Bank of America v. Touche Ross & Co.*, 782 F.2d 966, 971 (11th Cir. 1986) (nine acts of wire and mail fraud; post-*Sedima* relying on *Waschmaker*); *United States v. Waschmaker*, 761 F.2d 1459, 1475 (11th Cir. 1985) (three shootings); *United States v. Pepe*, 747 F.2d 632, 661-63 (11th Cir. 1984) (interstate travel and extortionate collection of a debt); *United States v. Phillips*, 664 F.2d 971, 1039 (5th Cir. 1981), *cert. denied*, 457 U.S. 1136 (1982) (foreign travel and importation of marijuana); *see also United States v. Starnes*, 664 F.2d 673, 677-78 (7th Cir. 1981), *cert. denied*, 454 U.S. 826 (1982) (interstate travel, arson and mail fraud); *United States v. Weatherspoon*, 581 F.2d 595, 601-02 (7th Cir. 1978) (five acts of mail fraud); *United States v. Parness*, 503 F.2d 430, 438 (2d Cir. 1974) (two acts of interstate travel).

that violates two statutes, has been committed." *Kragness*, 830 F.2d at 861.[5]

Given the government's aggressive employment of RICO in conjunction with charges under the federal drug laws these conflicting constructions of the pattern requirement justify this Court's review.

The conflict between the Eleventh and Eighth Circuits on the question presented for review by this petition presages future conflicts between the courts of appeal arising from their various analyses of the RICO pattern requirement.

First Circuit

The First Circuit has declined to adopt a particular analysis "that relies solely on whether activity can be classified as a single scheme or episode." *Roeder v. Alpha Industries, Inc.*, 814 F.2d 22, 31 (1st Cir. 1987). However, the court did not find a pattern in one bribe paid in three installments. Despite the temporal separation between each installment, the court determined that the isolated bribe did not reflect a threat of continuing activity.

Second Circuit

Surveying the Second Circuit's recent attempts to apply the pattern requirement, Circuit Judge Pratt described the division within

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[5] In *Kragness* the government presented evidence of many predicate acts committed by defendant Caspersen, including two crimes charged from the same act. The court of appeals could not determine which acts were the basis for the jury's general verdict of guilty. The court was compelled to reverse Caspersen's RICO conviction on the principle that "[i]f the instructions leave open the logical possibility that the verdict is based on a legally insufficient predicate, the conviction cannot stand." *Kragness*, 830 F.2d at 861. In *Hobson* the jury was instructed to consider only the two drug charges as potential predicate acts.

the circuit as one of "mild chaos" virtually certain to turn into "sheer bedlam." *Furman v. Cirrito*, 828 F.2d 898, 909 (2d Cir. 1987) (dissenting opinion). The Second Circuit nominally relies on an analysis which merges the issue of pattern into the analysis of the RICO enterprise requirement.[6]

> We hold that when a person commits at least two acts that have the common purpose of furthering a continuing criminal enterprise with which that person is associated, the elements of relatedness and continuity which the *Sedima* footnote construes section 1962(c) to include are satisfied.

United States v. Ianiello, 808 F.2d 184, 193 (2d Cir. 1986), *cert. denied*, 107 S.Ct. 3229 (1987); *see also United States v. Teitler*, 802 F.2d 606 (2d Cir. 1986). As applied in *Ianiello* this analysis reflected a literal and broad construction of the pattern requirement.[7] In subsequent cases the Second Circuit inexplicably and abruptly reversed field, though purportedly relying on *Ianiello*, to require that the racketeering acts be committed as part of an ongoing RICO enterprise pursing multiple illegal goals. *See Albany Ins. Co. v. Esses*, 831 F.2d 41 (2d Cir. 1987); *Furman v. Cirrito*, 828 F.2d 898 (2d Cir. 1987); *Beck v. Manufacturers Hanover Trust Co.*, 820 F.2d 46 (2d Cir. 1987). The Second Circuit's analytic gyrations have caused understandable confusion, including a

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[6] This conflicts with *Turkette's* distinction between the RICO enterprise and the RICO pattern. *Turkette*, 452 U.S. at 583.

[7] *See California Architectural Bldg. Prods., Inc. v. Franciscan Ceramics, Inc.*, 818 F.2d 1466, 1469n.1 (9th Cir. 1987).

dispute concerning whether the pattern requirement under civil RICO differs from that under criminal RICO. *See Furman v. Cirrito*, 828 F.2d at 907-910 (Pratt, J., dissenting opinion) ("this bedlam has begun to emerge").

Third Circuit

The Third Circuit analyzes the RICO pattern requirement on a case-by-case basis and considers "the number of unlawful acts, the length of time over which the acts were committed, the similarity of the acts, the number of victims, the number of perpetrators, and the character of the unlawful activity." *See Barticheck v. Fidelity Union Bank*, 832 F.2d 36, 39 (3d Cir. 1987); *Town of Kearny v. Hudson Meadows Urban Renewal*, 829 F.2d 1263, 1267-68 (3d Cir. 1987); *United States v. Grayson*, 795 F.2d 278, 289-90 (3d Cir. 1986), *cert. denied sub nom. Robinson v. United States*, 107 S.Ct. 927 (1987). The court has rejected the requirements that a RICO pattern involve "two distinct unlawful schemes" and that only an "on-going or open ended" scheme can constitute a RICO pattern. *See Barticheck v. Fidelity Union Bank*, 832 F.2d at 39.

Fourth Circuit

The Fourth Circuit concluded that *Sedima* requires strict adherence to the pattern requirement and applies a narrow, case-by-case analysis of the pattern issue. The court has grafted a criminality factor to the pattern analysis which has no apparent foundation in the statutory language or this Court's decisions concerning RICO. *See HMK Corp. v. Walsey*, 828 F.2d 1071, 1073-74 (4th Cir. 1987);

International Data Bank, Ltd. v. Zepkin, 812 F.2d 149, 155 (4th Cir. 1987).

Fifth Circuit

The Fifth Circuit broadly construes the pattern requirement and is currently bound by a precedent which pays little heed to the factor of continuity emphasized in *Sedima*. *See R.A.G.S. Couture, Inc. v. Hyatt*, 744 F.2d 1350 (5th Cir. 1985) (two acts of mail fraud in furtherance of a single fraud constitute a pattern). To the contrary, one panel of the court suggests that "two illegal acts will not constitute a RICO pattern in every instance," *Cowan v. Corley*, 814 F.2d 223, 227 (5th Cir. 1987), and another panel urges that *R.A.G.S.* be overturned *en banc*. *Montesanto v. Seafirst Commercial Corp.*, 818 F.2d 423, 425-26 (5th Cir. 1987). In *Montesanto*, the panel added that illegal "preparatory acts to the accomplishment of a discrete offense do not form a pattern of racketeering activity." *Montesanto*, 818 F.2d at 426.

Seventh Circuit

The Seventh Circuit analyzes the RICO pattern requirement on a case-by-case basis and requires temporal separation between the predicate acts to establish the continuity factor. "[T]he predicate acts must be ongoing over an identified period of time so that they can fairly be viewed as constituting separate transactions, *i.e.*, 'transactions somewhat separated in time and place.'" *Morgan v. Bank of Waukegan*, 804 F.2d 970, 975 (7th Cir. 1986); *see Skycom Corp. v. Telstar Corp.*, 813 F.2d 810, 818 (7th Cir. 1987); *Marks v. Pannell Kerr Foster*, 811 F.2d 1108, 1111-12 (7th Cir. 1987).

Eighth Circuit

The Eighth Circuit applies a stringent pattern analysis requiring more than one fraudulent scheme. Thus, multiple acts of racketeering activity in furtherance of one overall fraud, regardless of the time period over which the acts are committed, do not demonstrate the continuity necessary to establish a pattern. *See, e.g., Ornest v. Delaware North Companies, Inc.*, 818 F.2d 651, 652 (8th Cir. 1987) (acts of mail fraud and travel in aid of a racketeering enterprise committed over eight years); *Deviries v. Prudential-Bache Securities, Inc.*,805 F.2d 326, 329 (8th Cir. 1986) (fraudulent misrepresentations and churning over six years); *Holmberg v. Morrisette*, 800 F.2d 205, 209-10 (8th Cir. 1986), *cert. denied*, 107 S.Ct. 1953 (1987) (acts of mail and wire fraud committed over one year); *Superior Oil Co. v. Fulmer*, 785 F.2d 252, 254-57 (8th Cir. 1986) (acts of mail and wire fraud committed over several years).

Ninth Circuit

The Ninth Circuit literally and broadly interprets the RICO requirement. The court has declined to employ the continuity factor identified in *Sedima* to limit RICO's application "without additional explication by the Supreme Court" and relies on the plain words of RICO. *California Architectural Bldg. Prods., Inc. v. Franciscan Ceramics, Inc.*, 818 F.2d 1466, 1469 (9th Cir. 1987). The court requires temporal separation between the predicate acts. "Thus, if a defendant

commits two or more predicate acts that are not isolated events, are separate in time, and are in furtherance of a single criminal scheme, then RICO's pattern requirement is satisfied." *Sun Savings and Loan Ass'n v. Dierdorff*, 825 F.2d 187, 193 (9th Cir. 1987).

Tenth Circuit

The Tenth Circuit has not adopted "a bright-line test in the abstract," but employs a narrow analysis of the pattern requirement which approaches the Eighth Circuit's multiple fraudulent scheme analysis. The court has held that "[a] scheme to achieve a single discrete objective does not in and of itself create a threat of ongoing activity, even when that goal is pursued by multiple illegal acts, because the scheme ends when the purpose is accomplished." *Torwest DBC, Inc. v. Dick*, 810 F.2d 925, 928-29 (10th Cir. 1987); *see Garbade v. Great Divide Mining and Milling Corp.*, 831 F.2d 212, 214 (10th Cir. 1987); *Condict v. Condict*, 815 F.2d 579 (10th Cir. 1987).

There is no apparent reason to conclude that the courts of appeal will soon agree on a general analysis of the pattern requirement. Several circuits are nominally unaffected by *Sedima's* comments on the issue (2d, 9th and 11th); several circuits are currently in turmoil on the issue (2d, 5th and 8th); and the differences among the various analyses, distinguished by an abstract and obscure vocabulary of "schemes," "transactions," and "episodes," will not soon be overcome without this Court's pronouncement.

CONCLUSION

For the reasons stated the petition for a writ of certiorari to the United States Court of Appeals for the Eleventh Circuit should be granted.

Dated: New York, New York
December 18, 1987

Respectfully submitted,

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APPENDIX A

OPINION OF THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

U.S. v. HOBSON

UNITED STATES of America, Plaintiff-Appellee,
v.
Russell HOBSON, Defendant-Appellant.

Russell HOBSON, Petitioner-Appellant,
v.
UNITED STATES of America,
Respondent-Appellee.

Nos. 85-3517, 86-3589.

United States Court of Appeals,
Eleventh Circuit.

Aug. 25, 1987.

Motion for new trial based on newly discovered evidence and motion for postconviction relief were denied by the United States District Court for the Northern District of Florida, No. PCR 81-440, Maurice Mitchell Paul, J., and movant appealed. On consolidated appeal, the Court of Appeals held that: (1) sufficiency of evidence claim was not entitled to review pursuant to motion for postconviction relief as such issue was raised and considered on direct appeal; (2) movant was not entitled to evidentiary hearing and reconsideration of issue regarding admissibility of wiretap evidence; and (3) movant was not entitled to new trial on basis of newly discovered evidence.

Affirmed.

U.S. v. HOBSON

1. Criminal Law 997.7

Consideration of petitioner's insufficiency of evidence claim, which was raised and considered on direct appeal, was not entitled to reconsideration pursuant to motion for postconviction relief. 28 U.S.C.A. § 2255.

2. Courts 96(3)

United States Supreme Court's determination that two acts of racketeering do not constitute pattern unless they have continuity does not necessarily change Eleventh Circuit's rule that two separate crimes clearly constitute two separate acts for purposes of RICO.

3. Criminal Law 997.7

District court did not abuse its discretion in refusing to reconsider petitioner's claim regarding inadmissibility of wiretap evidence pursuant to petition for postconviction relief, despite subsequent Florida trial court decision in petitioner's favor, where on direct appeal, Court of Appeals determined that wiretaps were sufficient under Florida law and evidence derived from them was admissible. 28 U.S.C.A. § 2255.

4. Criminal Law 938(1)

To prevail on motion for new trial based on newly discovered evidence, evidence must be discovered following trial, movant must show due diligence to discover evidence, evidence must not be merely cumulative or impeaching, evidence must be material to issues before court, and evidence must be of such nature that new trial would probably produce new result.

U.S. v. HOBSON

5. Criminal Law 938(1)

Movant was not entitled to new trial on charges of importation and distribution of marijuana, based on claim of newly discovered evidence, to effect that prosecutor allegedly accepted bribe from government witness, where movant's evidence presented in motion was based on uncorroborated and conclusory statements by convicted co-defendants, and movant failed to demonstrate how allegations of bribery, if introduced at new trial, would produce different result.

Appeals from the United States District Court for the Northern District of Florida.

Before GODBOLD and HILL, Circuit Judges, and ESCHBACH*, Senior Circuit Judge.

PER CURIAM

Hobson was convicted in 1981 on six counts relating to the importation and distribution of marijuana. He was sentenced to 35 years imprisonment, a fine of $110,000, and a two-year special parole term. His conviction was affirmed by the Eleventh Circuit in *U.S. v. Bascaro*, 742 F.2d 1335 (11th Cir.1984), *cert. denied*, 472 U.S. 1017, 105 S.Ct. 3476, 87 L.Ed.2d 613 (1985).[1] Hobson's subsequent motion for a new trial based on newly discovered evidence was denied by the district court. Hobson's appeal of this decision (No. 85-3517) was

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* Honorable Jesse E. Eschbach, Senior U.S. Circuit Judge for the Seventh Circuit, sitting by designation.

1. For a discussion of the facts underlying Hobson's conviction, *see Bascaro*, 742 F.2d at 1341-42.

stayed pending the resolution of his motion to vacate his sentence under 28 U.S.C. § 2255.

Hobson raised four issues in his § 2255 motion before the district court: (1) ineffective assistance of counsel; (2) insufficiency of evidence to support conviction on any count; (3) government knowingly suppressed evidence; and (4) inadmissibility of wiretap evidence. The district court adopted the magistrate's initial and supplemental recommendations and denied Hobson's § 2255 motion. Hobson appeals the district court's adverse ruling on two issues only, insufficiency of evidence and inadmissibility of the wiretap evidence. This appeal (No. 86-3589) was consolidated with his appeal of the district court's denial of his motion for a new trial (No. 85-3517). In both appeals we affirm the district court's denial of Hobson's motions.

[1, 2] The district court refused to grant Hobson's § 2255 motion on the ground of insufficiency of evidence because Hobson had raised this issue on direct appeal and lost. The Eleventh Circuit also rejected this claim in Hobson's petition for writ of error coram nobis. The district court reasoned that the law is well settled that prior consideration of a defendant's sufficiency of evidence claim precludes further review. We find no error in this reasoning. *See Ordonez v. U.S.*, 588 F.2d 448, 448-49 (5th Cir.) (per curiam), *cert. denied*, 441 U.S. 963, 99 S.Ct. 2409, 60 L.Ed.2d 1068 (1979); *see also U.S. v. Kalish*, 780 F.2d 506, 508 (5th Cir.), *cert. denied*, — U.S. —, 106 S.Ct. 1977, 90 L.Ed.2d 660 (1986); *U.S. v. Rowan*, 663 F.2d 1034, 1035 (11th Cir.1981) (per curiam); *U.S. v. Johnson*, 615 F.2d 1125, 1128 (5th Cir.1980) (per curiam); *U.S. v. Greer*, 600 F.2d 468, 469 (5th Cir.), *cert. denied*, 444 U.S. 902, 100 S.Ct. 213, 62 L.Ed.2d 138 (1979); *Buckelew v. U.S.*, 575 F.2d 515, 517-18 (5th Cir.1978); *McGee v. U.S. District Court*, 489 F.2d 703, 704 (5th Cir.1973) (per curiam).[2]

---

2. Hobson's argument that we should reconsider our prior ruling on the sufficiency of the evidence supporting his RICO convictions in light of *Sedima, S.P.R.L. v. Imrex Co.*, 473 U.S. 479, 105 S.Ct. 3275, 87 L.Ed.2d 346 (1985) is unpersuasive. *Sedima's* footnote

[3] The district court held that because Hobson had lost on his claim regarding the inadmissibility of the wiretap evidence before the trial court and on appeal, it would not hold an evidentiary hearing and reconsider the issue in a collateral proceeding under § 2255. The district court did not abuse its discretion. *See Kaufman v. U.S.*, 394 U.S. 217, 227 n. 8, 89 S.Ct. 1068, 1074 n. 8, 22 L.Ed.2d 227 (1969); *Buckelew v. U.S.* 575 F.2d 515, 517-18 (5th Cir.1978); *Vernell v. U.S.*, 559 F.2d 963, 964 (5th Cir.1977) (per curiam), *cert. denied*, 435 U.S. 1007, 98 S.Ct. 1876, 56 L.Ed.2d 388 (1978). This court ruled on Hobson's direct appeal that the wiretaps were sufficient under Florida law and the evidence derived from them was therefore admissible against him. *Bascaro*, 742 F.2d at 1347-48. A subsequent Florida trial court decision that reached the opposite conclusion should not affect our prior ruling on direct appeal.

The district court denied Hobson's amended motion for a new trial based on the newly discovered evidence that the prosecutor allegedly accepted a bribe from Clyde Cobb, a government witness. Hobson contends on appeal that the district court abused its discretion in failing to conduct an evidentiary hearing before denying the motion.

[4, 5] To prevail on a motion for a new trial based on newly discovered evidence, five elements must be present:

> (1) the evidence must be discovered following the trial; (2) the movant must show due diligence to discover the evidence; (3) the evidence must not be merely cumulative or impeaching; (4) the evidence must be material to issues

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explaining that two acts of racketeering do not constitute a pattern unless they have continuity does not necessarily change this circuit's rule, as applied in Hobson's direct appeal, that two separate crimes clearly constitute two separate acts for purposes of RICO. *See Bank of America Nat'l Trust & Savings Assn. v. Touche Ross & Co.*, 782 F.2d 966, 971 (11th Cir.1986).

> before the court; and (5) the evidence must be of such a nature that a new trial would probably produce a new result.

U.S. v. Bollinger, 796 F.2d 1394, 1401 (11th Cir.1986). Hobson failed to show that these five elements were present. First, the district court properly discredited the evidence relied on by Hobson in his motion for a new trial because it was based on uncorroborated and conclusory statements by convicted co-defendants.[3] *See U.S. v. Simmons*, 714 F.2d 29, 31 (5th Cir.1983); *U.S. v. Metz*, 652 F.2d 478, 480-8 (5th Cir. Unit A 1981). Second, Hobson has failed to demonstrate how the allegations of bribery, if introduced at a new trial, would produce a different result. The only benefit to Hobson from this evidence would be in its added impeachment value against Cobb, who testified against Hobson at his original trial. In light of the extensive impeachment of Cobb's testimony and the overwhelming evidence presented on Hobson's guilt, any additional impeachment material with respect to Cobb would have been cumulative and not likely to produce a different result at trial. *See U.S. v. Johnson*, 713 F.2d 654, 662 (11th Cir.1983), *cert. denied*, 465 U.S. 1030, 104 S.Ct. 1295, 79 L.Ed.2d 695 (1984); *Bentley v. U.S.*, 701 F.2d 897, 899 (11th Cir.1983).

AFFIRMED.

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3. Hobson relied on the following newly discovered evidence: (1) Cobb admitted to Tommie Lee, a co-defendant in a related case, that he had bribed the prosecutor; (2) Cobb admitted in a letter to his pre-indictment lawyer that he had bribed the prosecutor; (3) another co-defendant admitted having bribed the prosecutor; (4) Manuel James, who was a co-conspirator's attorney and who was later convicted as a defendant in the case, acknowledged that he had given Cobb's bribe to the prosecutor; and (6) prosecutor resigned the day after James gave his testimony to the grand jury regarding the alleged bribe.

APPENDIX B

Order of the United States Court of Appeals for the Eleventh Circuit

IN THE

United States Court of Appeals

For the Eleventh Circuit

NO. 85-3517

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

versus

RUSSELL HOBSON,

Defendant-Appellant.

NO. 86-3589

RUSSELL HOBSON,

Petitioner-Appellant,

versus

UNITED STATES OF AMERICA,

Respondent-Appellee.

Appeals from the United States District Court for The Northern District of Florida

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ON PETITION(S) FOR REHEARING AND SUGGESTION(S) OF REHEARING IN BANC.

(Opinion August 25, 1987, 11 Cir., 198__, ___F. 2d___).

(SEPTEMBER 23, 1987)

Before GODBOLD and HILL, Circuit Judges, and ESCHBACH*, Senior Circuit Judge.

PER CURIAM:

(x) The Petition(s) for Rehearing are DENIED and no member of this panel nor other Judge in regular active service on the Court having requested that the Court be polled on rehearing in banc (Rule 35, Federal Rules of Appellate Procedure; Eleventh Circuit Rule 35-5), the Suggestion(s) of Rehearing in Banc are DENIED.

( ) The Petition(s) for Rehearing are DENIED and the Court having been polled at the request of one of the members of the Court and a majority of the Circuit Judges who are in regular active service not having voted in favor of it (Rule 35, Federal Rules of Appellate Procedure; Eleventh Circuit Rule 35-5), the Suggestion(s) of Rehearing in Banc are also DENIED.

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* Honorable Jesse E. Eschbach, Senior U.S. Circuit Judge for the Seventh Circuit sitting by designation.

( ) A member of the Court in active service having requested a poll on the reconsideration of this cause in banc, and a majority of the judges in active service not having voted in favor of it, Rehearing in Banc is DENIED.

ENTERED FOR THE COURT:

s/_____

APPENDIX C

STATUTES INVOLVED

RACKETEER INFLUENCED AND CORRUPT ORGANIZATIONS ACT (RICO),

18 U. S. C. § 1961-1962 (1978)

§ 1961. Definitions

As used in this chapter—

(1) "racketeering activity" means (A) any act or threat involving murder, kidnaping, gambling, arson, robbery, bribery, extortion, or dealing in narcotic or other dangerous drugs, which is chargeable under State law and punishable by imprisonment for more than one year; (B) any act which is indictable under any of the following provisions of title 18, United States Code: Section 201 (relating to bribery), section 224 (relating to sports bribery), sections 471, 472, and 473 (relating to counterfeiting), section 659 (relating to theft from interstate shipment) if the act indictable under section 659 is felonious, section 664 (relating to embezzlement from pension and welfare funds), sections 891-894 (relating to extortionate credit transactions), section 1084 (relating to the transmission of gambling information), section 1341 (relating to mail fraud), section 1343 (relating to wire fraud), section 1503 (relating to obstruction of justice), section 1510 (relating to obstruction of criminal investigations), section 1511 (relating to the obstruction of State or local law enforcement), section 1951 (relating to interference with commerce, robbery, or extortion), section 1952 (relating to racketeering), section 1953 (relating to interstate transportation of wagering paraphernalia), section 1954 (relating to unlawful welfare fund payments),

section 1955 (relating to the prohibition of illegal gambling businesses), section 2314 and 2315 (relating to interstate transportation of stolen property), sections 2341-2346 (relating to trafficking in contraband cigarettes), sections 2421-24 (relating to white slave traffic), (C) any act which is indictable under title 29, United States Code, section 186 (dealing with restrictions on payments and loans to labor organizations) or section 501(c) (relating to embezzlement from union funds), (D) any offense involving fraud connected with a case under title 11, fraud in the sale of securities, or the felonious manufacture, importation, receiving, concealment, buying, selling, or otherwise dealing in narcotic or other dangerous drugs, punishable under any law of the United States, or (E) any act which is indictable under the Currency and Foreign Transactions Reporting Act;

* * *

(5) "pattern of racketeering activity" requires at least two acts of racketeering activity, one of which occurred after the effective dated of this chapter and the last of which occurred within ten years (excluding any period of imprisonment) after the commission of a prior act of racketeering activity;

* * *

§ 1962. Prohibited activities

(a) It shall be unlawful for any person who has received any income derived, directly or indirectly,

from a pattern of racketeering activity or through collection of an unlawful debt in which such person has participated as a principal within the meaning of section 2, title 18, United States Code, to use or invest, directly or indirectly, any part of such income, or the proceeds of such income, in acquisition of any interest in, or the establishment or operation of, any enterprise which is engaged in, or the activities of which affect, interstate or foreign commerce. A purchase of securities on the open market for purposes of investment, and without the intention of controlling or participating in the control of the issuer, or of assisting another to do so, shall not be unlawful under this subsection if the securities of the issuer held by the purchaser, the members of his immediate family, and his or their accomplices in any pattern or racketeering activity or the collection of an unlawful debt after such purchase do not amount in the aggregate to one percent of the outstanding securities of any one class, and do not confer, either in law or in fact, the power to elect one or more directors of the issuer.

(b) It shall be unlawful for any person through a pattern of racketeering activity or through collection of an unlawful debt to acquire or maintain, directly or indirectly, any interest in or control of any enterprise which is engaged in, or the activities of which affect, interstate or foreign commerce.

(c) It shall be unlawful for any person employed by or associated with any enterprise engaged in, or the activities of which affect, interstate or foreign

commerce, to conduct or participate, directly or indirectly, in the conduct of such enterprise's affairs through a pattern of racketeering activity or collection of unlawful debt.

(d) It shall be unlawful for any person to conspire to violate any of the provisions of subsections (a), (b), or (c) of this section.

21 U. S. C. § 841. Prohibited acts A

Unlawful acts

(a) Except as authorized by this subchapter, it shall be unlawful for any person knowingly or intentionally—

(1) to manufacture, distribute, or dispense, or possess with intent to manufacture, distribute, or dispense, a controlled substance; or

(2) to create, distribute, or dispense, or possess with intent to distribute or dispense, a counterfeit substance.

21 U. S. C. § 952. Importation of controlled substances

Controlled substances in schedules I or II and narcotic drugs in schedules III, IV, or V; exceptions

(a) It shall be unlawful to import into the customs territory of the United States from any place outside thereof (but within the United States), or to import into the United States from any place outside thereof, any controlled substance in schedule I or II of subchapter I of this chapter, or any narcotic drug in schedule III, IV, or V of subchapter I of this chapter, except that—

(1) such amounts of crude opium and coca leaves as the Attorney General finds to be necessary to provide for medical, scientific, or other legitimate purposes, and

(2) such amounts of any controlled substance in schedule I or II or any narcotic drug in schedule III, IV, or V that the Attorney General finds to be necessary to provide for the medical, scientific, or other legitimate needs of the United States—

(A) during an emergency in which domestic supplies of such substance or drug are found by the Attorney General to be inadequate, or

(B) in any case in which the Attorney Geral finds that competition among domestic manufacturers of the controlled substance is inadequate and will not be rendered adequate by the registration of additional manufacturers under section 823 of this title,

may be so imported under such regulations as the Attorney General shall prescribe. No crude opium may be so imported for the purpose of manufacturing heroin or smoking opium.

Supreme Court, U.S.
FILED
FEB 19 1988
JOSEPH F. SPANIOL, JR.
CLERK

No. 87-1051

In the Supreme Court of the United States

OCTOBER TERM, 1987

RUSSELL HOBSON, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

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In the Supreme Court of the United States

OCTOBER TERM, 1995

RUSSELL HOBSON, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
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QUESTION PRESENTED

Whether there has been an intervening change of law concerning the predicate act requirement of the Racketeer Influenced and Corrupt Organizations Act (RICO), 18 U.S.C. 1962, that entitles petitioner to challenge under 28 U.S.C. 2255 the sufficiency of the evidence supporting his RICO conviction even though the same claim was raised and rejected on direct appeal.

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In the Supreme Court of the United States

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No. 87-1051

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UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINION BELOW

The opinion of the court of appeals (Pet. App. 1a-6a) is reported at 825 F.2d 364.

JURISDICTION

The judgment of the court of appeals was entered on August 25, 1987. A petition for rehearing was denied on September 23, 1987 (Pet. App. 7a-9a). The petition for a writ of certiorari was filed on December 22, 1987. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

Following a jury trial in the United States District Court for the Northern District of Florida, petitioner was convicted of participating in the affairs of an enterprise through a pattern of racketeering activity, in violation of 18 U.S.C. 1962(c) (RICO); conspiring to commit that offense, in violation of 18

U.S.C. 1962(d) (RICO conspiracy); importing marijuana, in violation of 21 U.S.C. 952(a); conspiring to commit that offense, in violation of 21 U.S.C. 963; possessing marijuana with intent to distribute it, in violation of 21 U.S.C. 841(a)(1); and conspiring to commit that offense, in violation of 21 U.S.C. 846. He was sentenced to a total of 35 years' imprisonment and a $110,000 fine.[1] The court of appeals affirmed, *United States* v. *Bascaro*, 742 F.2d 1335 (11th Cir. 1984), and this Court denied certiorari, 472 U.S. 1017 (1985). Thereafter, petitioner sought collateral relief under 28 U.S.C. 2255. The district court denied the motion, and the court of appeals affirmed. Pet. App. 1a-6a.

1. The evidence at trial is summarized in the opinion of the court of appeals on direct appeal (742 F.2d at 1342, 1358-1359). It established the existence of a ring headed by co-defendants Antonio Bascaro and Manuel Villanueva that engaged in numerous drug smuggling ventures from late 1977 to early 1981. Petitioner was a "preferred customer[]" of the enterprise; he and co-defendant Michael Waldrop purchased marijuana from the organization on 25 to 30 separate occasions (*id.* at 1358).

In January 1979, co-conspirator Clyde Cobb decided to attempt to smuggle marijuana by airplane (38 R. 186). In mid-January, pursuant to Cobb's plan, James McDonnell flew a DC-3 airplane to Colombia, took on a cargo of marijuana, and flew back to Fort Lauderdale. The plane and its cargo were seized by federal and local law enforcement agents at the Fort Lauderdale airport. 32 R. 127, 151-154.

---

[1] The court imposed the sentences as follows: consecutive terms of 7-1/2 years' imprisonment on the RICO and RICO conspiracy counts; consecutive terms of five years' imprisonment on each of the four controlled substances counts; and cumulative fines of $25,000 on each of the RICO counts and $15,000 on each of the controlled substances counts.

Two weeks later, McDonnell agreed to make a second attempt to smuggle marijuana by aircraft (32 R. 156-157). Coconspirator Patrick Waldrop had made a down payment of $1,500,000 to Cobb's brother-in-law, and Waldrop and petitioner consequently expected to receive a substantial part of the planeload of marijuana (38 R. 187; 40 R. 55). Waldrop and petitioner pressured Cobb to produce the marijuana or return the $1,500,000 (38 R. 220-223). On February 13, 1979, McDonnell and two others flew to Colombia in a Lockheed Constellation and obtained 25,795 pounds of marijuana (32 R. 140, 160-161). Trucks furnished by Waldrop and petitioner were readied to meet the airplane at a clandestine landing site to take possession of most of the Constellation's cargo (39 R. 10-12). On the return flight, however, fog and engine problems prevented the Constellation from landing at the clandestine site (32 R. 163-166). McDonnell finally landed at an airport in Panama City, Florida, in the early morning hours on February 14, 1979 (32 R. 166). Federal agents arrested the crewmembers and seized the marijuana (32 R. 132-140, 167; 38 R. 187-188). Several hours after the Constellation was supposed to have arrived at the prearranged site, petitioner telephoned Cobb to ask what had happened (39 R. 18).

2. The predicate acts of racketeering underlying petitioner's RICO convictions were the importation of the marijuana aboard the Constellation and the possession of that marijuana with intent to distribute it. On direct appeal, petitioner contended that those two offenses did not qualify as a "pattern of racketeering activity" within the meaning of the RICO statute, 18 U.S.C. 1961(5), because they arose out of a single criminal episode. The court of appeals rejected that argument, concluding that "[p]ossessing and importing marijuana are two separate crimes and consequently two separate acts for purposes of the RICO statute." 742 F.2d at 1360-1361. Petitioner sought review of that ruling in a petition for a writ of certiorari, but this Court denied the petition. 472 U.S. 1017 (1985).

3. On September 19, 1985, petitioner moved in district court to vacate his sentence under 28 U.S.C. 2255, arguing once again that the evidence failed to establish that he had engaged in a "pattern of racketeering activity." The district court denied the motion on the ground that the court of appeals' earlier rejection of the claim precluded collateral review. Pet. App. 4a. On appeal, the court of appeals found "no error in this reasoning" (*ibid.*). The court of appeals rejected the contention that it should reconsider its previous ruling in light of a footnote in this Court's intervening decision in *Sedima, S.P.R.L.* v. *Imrex Co.*, 473 U.S. 479, 496 n.14 (1985). The court of appeals explained (Pet. App. 4a-5a n.2) that the pertinent language in *Sedima* "does not necessarily change this circuit's rule, as applied in [petitioner's] direct appeal, that two separate crimes clearly constitute two separate acts for purposes of RICO."

ARGUMENT

1. Petitioner contends that he is entitled to relief from his RICO conviction under 28 U.S.C. 2255. It is well settled, however, that courts are not required to reconsider claims of error under Section 2255 that were unsuccessfully asserted on direct appeal. See *Kaufman* v. *United States*, 394 U.S. 217, 227 n.8 (1969); *Giacalone* v. *United States*, 739 F.2d 40, 42 (2d Cir. 1984); *United States* v. *Rowan*, 663 F.2d 1034, 1035 (11th Cir. 1981); *Ordonez* v. *United States*, 588 F.2d 448, 448-449 (5th Cir.), cert. denied, 441 U.S. 963 (1979); *Egger* v. *United States*, 509 F.2d 745, 748 (9th Cir.), cert. denied, 423 U.S. 842 (1975); *Stephan* v. *United States*, 496 F.2d 527, 528-529 (6th Cir. 1974), cert. denied, 423 U.S. 861 (1975); *Jackson* v. *United States*, 495 F.2d 349, 351 (8th Cir. 1974); *McGuinn* v. *United States*, 239 F.2d 449, 450-451 (D.C. Cir. 1956), cert. denied, 353 U.S. 942 (1957).

Petitioner raised on direct appeal precisely the same claim he raises here, and the court of appeals rejected it. *Bascaro*, 742 F.2d at 1360-1361.

Petitioner argues that the courts below should have reconsidered his claim on the merits because of this Court's intervening decision in *Sedima*. This Court has held that a defendant is not precluded from collaterally attacking his conviction on the basis of a claim that was rejected on direct appeal if there has been an intervening change in the relevant law. *Davis* v. *United States*, 417 U.S. 333, 341-342 (1974). But that principle is not applicable in this case, because *Sedima* did not change the law that was applied in *Bascaro*.

A "pattern of racketeering activity," as defined in 18 U.S.C. 1961(5), requires proof of at least two acts of racketeering activity committed during a single ten-year period. In *Sedima*, the Court observed (473 U.S. at 496 n.14) that while two acts of racketeering are necessary to establish a pattern under RICO, they "may not be sufficient." The Court explained that "two isolated acts of racketeering activity do not constitute a pattern"; rather, a pattern requires " '*continuity plus relationship*' " (*ibid.*, quoting S. Rep. 91-617, 91st Cong., 1st Sess. 158 (1969) (emphasis in original)). The Court went on to quote with approval the definition of "pattern" in the Dangerous Special Offender statute, 18 U.S.C. 3575(e), as " 'embrac[ing] criminal acts that have the same or similar purposes, results, participants, victims or methods of commission, or otherwise are interrelated by distinguishing characteristics and are not isolated events' " (473 U.S. at 496 n.14 (citation omitted)).

The footnote in *Sedima* on which petitioner relies stands for the proposition that isolated, unrelated acts may not satisfy the requirement of a "pattern" under RICO. But petitioner's acts of racketeering were anything but isolated. Rather, his importation and possession offenses "were closely related to each other and to the ongoing objective of narcotics smuggling."

United States v. *Fernandez*, 797 F.2d 943, 951 n.5 (11th Cir. 1986), cert. denied, No. 86-1577 (June 22, 1987). The issue in this case is not whether petitioner's offenses were too isolated or sporadic to qualify as a "pattern"; it is whether his offenses failed to meet the "pattern" requirement because they arose out of the same criminal episode and thus were too closely related. The *Sedima* footnote simply did not address that issue. The court of appeals was therefore correct in concluding (Pet. App. 4a-5a n.2) that *Sedima* did not change the relevant law that was applied on direct appeal in *Bascaro*.

2. In *United States* v. *Kragness*, 830 F.2d 842, 860-861 (8th Cir. 1987), the court held that the offenses of importing marijuana and possessing marijuana with intent to distribute it do not constitute a "pattern of racketeering" where they arise out of the single act of shipping marijuana into the United States. Even if the position taken by the court in *Kragness* is legally correct when the importation and possession offenses arise from a single criminal act, the analysis employed by the Eighth Circuit may require a different result in a case such as this one, where the defendant engages in a series of acts over a period of time that relate to the two predicate offenses.[2]

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[2] The RICO statute does not prohibit reliance on two or more acts of racketeering that arise from the same criminal episode. See, *e.g.*, *United States* v. *Phillips*, 664 F.2d 971, 1039 (5th Cir. 1981), cert. denied, 457 U.S. 1136 (1982); *United States* v. *Weatherspoon*, 581 F.2d 595, 601-602 (7th Cir. 1978); *United States* v. *Parness*, 503 F.2d 430, 441-442 (2d Cir. 1974), cert. denied, 419 U.S. 1105 (1975). Nonetheless, the Department of Justice has established a policy against charging multiple predicate acts based on a single episode of criminal conduct. As the *Kragness* court observed (830 F.2d at 861) using marijuana possession and importation offenses as separate acts of racketeering activity when they are based on a single criminal act is contrary to that policy. Using those two charges as separate predicate acts was contrary to the terms of the authorization

In any event, *Kragness* was decided after the decision of the court of appeals in this case, and the Eleventh Circuit therefore did not have the opportunity to consider it. Furthermore, even if *Kragness* had come first, it would not have constituted an intervening change in the law of the Eleventh Circuit requiring that court to reconsider its initial rejection of petitioner's claim. The judgment below—that petitioner's claim does not justify relief under Section 2255 on the basis of an intervening change in the law—is therefore correct.[3]

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approving the prosecution in the *Kragness* case; the treatment of the possession and importation offenses in *Kragness* as separate predicate acts was apparently the result of an error in the prosecutor's interpretation of the terms under which the prosecution in that case was authorized. We are advised that the *Kragness* decision has prompted the Organized Crime and Racketeering Section of the Department's Criminal Division, which is responsible for reviewing and authorizing all RICO prosecutions, to take steps to make the terms of its approval more explicit with respect to the Department's policy against charging as separate racketeering acts multiple offenses that arise out of a single criminal episode. For that reason, we do not anticipate that the problem presented by the *Kragness* case—and in different form by the present case—will arise with any frequency in the future.

[3] We note that any error in counting the importation offense and the possession offense as separate acts of racketeering would not require reversal of petitioner's RICO conspiracy conviction (or any of his convictions on the controlled substances counts). To prove a RICO conspiracy, the government must show only that the defendant agreed to commit two predicate acts of racketeering in furtherance of the enterprise; it need not show actual commission of those offenses. See, *e.g.*, *United States* v. *Carter*, 721 F.2d 1514, 1529-1531 (11th Cir.), cert. denied, 469 U.S. 819 (1984). Even if the evidence failed to show that petitioner actually engaged in a "pattern of racketeering," it clearly established that he agreed to do so—that is, that he agreed both to import marijuana and to possess marijuana with an intent to distribute it as temporally distinct acts.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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In The

Supreme Court of the United States

October Term, 1987

RUSSELL HOBSON,

Petitioner,

vs.

UNITED STATES OF AMERICA,

Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Eleventh Circuit

PETITIONER'S REPLY MEMORANDUM

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PETITIONER'S REPLY MEMORANDUM

A Single Physical Act Does Not Constitute a "Pattern of Racketeering Activity" Under RICO

A "pattern of racketeering activity" under the Racketeer Influenced and Corrupt Organizations Act ("RICO"), 18 U.S.C. § 1961(5), consists of related, continuing acts of racketeering. *Sedima, S.P.R.L. v. Imrex Co.*, 473 U.S. 479, 496n.14 (1985). By holding that a

single act which simultaneously violates two statutes invariably constitutes a RICO pattern, *United States v. Hobson*, 825 F.2d 364, 366n.2 (11th Cir. 1987) (Pet. App. 4a-5a), the court of appeals failed to account for *Sedima's* identification of a continuity element in the pattern requirement.

Contrary to the government's argument, Brief in Opp. at 6, *Sedima* addressed the issue of whether predicate acts may be "too closely related" to meet the pattern requirement by including "continuity" as an element of a RICO pattern. The Seventh Circuit subsequently observed that "the continuity aspect of the pattern requirement can have practical importance. One can easily hypothesize cases in which two predicate acts are so closely related that they lack the requisite continuity and do not satisfy the pattern requirement." *Morgan v. Bank of Waukegan*, 804 F.2d 970, 976 (7th Cir. 1986). District Judge Edward Weinfeld similarly described the paradox of *Sedima's* pattern analysis.

> Since *Sedima*, lower courts have sought to refine the notions of a relationship and continuity to develop a meaningful definition of "pattern." On the one hand, they have held that the predicate acts must share sufficient facts in common that they satisfy the requirement of "relatedness." On the other hand, the acts must not be too closely related, because they would then not suggest there is a threat of continuing criminal activity.

Bear Creek Production, Inc. v. Saleh, 643 F. Supp. 489, 495 (S.D.N.Y. 1986).

Sedima prohibits reliance on the rule applied on Hobson's direct-appeal that "two separate crimes [constitute] two separate acts for purposes of the RICO statute", *United States v. Bascaro*, 742 F.2d 1335, 1360-361 (11th Cir. 1984), *cert. denied*, 472 U.S. 1017 (1985), if the crimes are "too closely related" to establish continuity. The government does not dispute that the jury instructions limited the RICO predicate acts charged against Hobson to two offenses that arose simultaneously from a single act: a down payment for a shipment of marijuana. *See* Brief in Opp. at 3. To maintain, as the government must, that this "singular criminal event" is not isolated but continuous "stretch[es] these concepts beyond recognition." *Morgan v. Bank of Waukegan*, 804 F.2d at 976 (quoting *Ghouth v. Conticommodity Services*, 642 F. Supp. 1325, 1337 [N.D.Ill. 1986]).

The Eighth Circuit's application of the continuity element in *United States v. Kragness*, 830 F.2d 842, 860-861 (8th Cir. 1987), squarely conflicts with *Hobson* and the government's present analysis of *Sedima*. In *Kragness* defendant Caspersen participated in the successful importation of two marijuana shipments into the United States. *Kragness*, 830 F.2d, at 849. The RICO counts against Caspersen were based on numerous predicate acts in addition to the violations of 21 U.S.C. § 841(a) (importation of marijuana) and 21 U.S.C. § 952(a) (possession of marijuana with intent to distribute) which arose out of the importation of a single shipment. Nevertheless, the Eighth Circuit reversed Caspersen's conviction for a substantive violation of RICO because "it is not proper under RICO to charge two predicate acts where one action violates two statutes." *United States v. Kragness*, 830 F.2d at 861.[1]

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[1] Petitioner does not dispute that a RICO violation may be premised on a single criminal episode or transaction consisting of tow temporally distinct acts each of

By purporting to distinguish *Hobson* as a case involving "a series of acts over a period of time that relate to the two predicate offenses," Brief in Opp. at 6, the government ignores the facts of *Kragness* and the numerous predicate acts sharged in the RICO counts against Caspersen. In *Kragness* the government charged all of the comparable related acts as predicate offenses to no avail because, as in *Hobson*, two of the predicate offenses arose from a single act. *United States v. Kragness*, 830 F.2d at 861. Furthermore, the government's implicit proposal that the jury in *Hobson* could remedy the deficiency in predicate offenses by reference to acts which were not charged as predicate offenses under the RICO counts has no basis in law. The Court cannot avoid the fact that *Hobson* and *Kragness* are diametrically opposed in their respective applications of the RICO pattern requirement, particularly the continuity element introduced by *Sedima*.[2]

This Court recognized the significance of the question presented for review by inviting the development of "a meaningful concept of 'pattern.'" *Sedima*, 473 U.S. at 500. No clearer set of facts could arise for the resolution of what constitutes a RICO pattern than two predicate offenses arising from a single act, as in *Hobson*.

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which gives rise to a RICO predicate offense. *See United States v. Kragness*, 830 F.2d at 861 n.19; *see also* No. 87-1051 Pet. at 12n.4 (cases cited therein); Brief in Opp. at 6n.2. In contrast, both of the predicate acts charged against Hobson arose from a single act.

2 The Justice Department's adjustment of its policy to prohibit RICO prosecutions premised on two offenses which arise from a single act, Brief in Opp. at 6n.2, does not reduce the tension between these decisions and provides no guidance in civil RICO cases. For instance, *Hobson* supports a civil RICO cause of action premised on violations of Section 12 of the Securities Act of 1933, 15 U.S.C. § 77n, and Section 10 of the Securities Exchange Act of 1934, 15 U.S.C. § 78j, arising from one misstatement of a material fact in a single prospectus.

CONCLUSION

For the foregoing reasons, and those stated in the petition, a writ of certiorari should issue to review the judgment and opinion of the Court of Appeals for the Eleventh Circuit.

Dated: New York, New York
March 15, 1988

Respectfully submitted,

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